IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 863 of 1999
With
CRIMINAL REVISION APPLICATION No. 529 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

==========

ASHOKBHAI SHANKARBHAI PRAJAPATI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :

In Cri. Appeal No. 864 of 1999

MR YN RAVANI for Appellant(s) : 1,
MR KP RAWAL for Opponent(s) : 1,

In Cri. Revision Application No.529 of 1999

Mr. MS Desai, for the applicant.

Mr. Y.N. Ravani for the opponents No.1 to 3.

Mr. K.P. Rawal, APP for the opponent No.4.

==========

CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 13/02/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellant has preferred this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment and order dated 31-7-1997 rendered by the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 64 of 1999, convicting him for the offence punishable under Section 323 of the I.P. Code and sentencing him to undergo rigorous imprisonment of six months and to pay fine of Rs.500/-, in default thereof, to undergo simple imprisonment of one week. The learned trial Judge acquitted the other accused in the case.

2. In brief, the prosecution case was that on 23-3-1998 at about 5-00 to 5-15 p.m. when complainant Kacharabhai Mangabhai was sitting at his 'panshop', Bharatbhai Shakarabhai with stick, Ashokbhai Shakarabhai with iron rod and Shakarabhai Madhabhai with wooden log came there giving abuses saying that why he had kept his 'panshop' on the panchayat land and that land does not belong to his father. Therefore, the

complainant asked them not to give abuses which enraged them. Bharatbhai gave stick blow on the head of complainant and also gave stick blow on left hand of Jadiben Kacharabhai, the wife of the complainant. Appellant Ashokbhai gave iron rod blow on the right hand of the complainant. Kamuben wife of Shakarabhai also came there and started giving abuses. As the complainant had sustained serious injuries on head, his cousin brother also tried to intervene and he was also injured in the incident. Therefore, all of them went to Gandhinagar General Hospital for treatment and the complainant was admitted in hospital for treatment.

3. The record indicates that after admission of the complainant in Gandhinagar General Hospital for treatment, 'Vardhi' Exh. 27 was recorded at 22-25 p.m. on 23-3-1998 at Sr. No. 36 in the Telephone Register and on the basis of the same, the complaint came to be recorded on 24-3-1998 and the offence was registered as II CR No.98/98 by Kalol Taluka Police Station. Thereafter investigation was started. During the investigation statement of witnesses were recorded and panchanamas of scene of offence and recovery of muddamal articles were drawn. During the investigation the appellant, his

father Shakarabhai and mother Kamuben were arrested. The case against Bharatbhai was dropped as he died on account of injuries sustained by him in the incident.

4. On completion of the investigation, charge sheet was laid before the Court of the learned Judicial Magistrate, First Class, Kalol, Dist. Gandhinagar for the offence punishable under Sections 323 read with Section 114, 504, 506(2) read with Section 114 of the I.P. Code.

5. It may be recorded that complainant Kacharabhai Mangabhai is the cousin brother of accused Shakarabhai, accused Kamuben Shakarabhai is wife and appellant/accused Ashok is the son of Shakarabhai Mangabhai, thereby the complainant and accused are relatives. It is also a relevant fact that accused Shakarabhai had also lodged compliant with regard to the incident that took place at 5-00 p.m. on 23-3-1998 near his house involving the complainant and others. It was registered as I. CR No. 78 of 1998 at Kalol Taluka Police Station. In the said offence, the present complainant, his sons Bakabhai @ Dashrathbhai and Rajeshkuamr, wife Jadiben Kacharabhai and one Bhikhabhai Mangabhai were arrested and were prosecuted for the offence punishable u/s 147, 148 and 302 read with

Section 149 of the I.P. Code, under Section 326, 325 and 324 read with Section 149 of the I.P.Code, and u/s 504 read with Section 149 of the I.P. Code in Sessions Case No.138 of 1998.

6. As the offence registered on the basis of the compliant filed by accused Shakarabhai was triable by Sessions Court, treating this case as cross-case learned Judicial Magistrate, First Class, Kalol committed the case to the Sessions Court, Mehsana and it was registered as Sessions Case No. 64 of 1999. The learned Addl. Sessions Judge, Mehsana framed charge Exh. 4 against the accused for the offences punishable u/ss 323, 325 read with Section 114 and u/s 504 and 506(2) read with Section 114 of the I.P. Code and the same was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence to prove the charge levelled against the accused. On completion of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against them in the evidence. The appellant in his first further statement recorded u/s 313 of the Code of Criminal Procedure, 1973 filed a statement at Exh. 35 with other accused and stated that there was

quarrel on 22-3-1998 at about 5-00 p.m. by Kacharabhai Mangabhai, Bakabhai Kacharabhai and Bhikhabhai Mangabhai with regard to removal of the wooden log and keeping grudge, on 23-3-1999 at about 5-00 p.m. all of them made assault and Bakabhai @ Dashrathbhai Kacharabhai Prajapati caused injuries to Bharatbhai on back side of head, right wrist and back with axe; that Bhikhabhai beat Shakarabhai with stick and kicks, and Rajeshkumar gave axe blow on right hand of Kamuben; that on account the serious injuries Bharatbhai Shakarabhai was taken to Gandhinagar Hospital by accused Shakarabhai and Kamuben and that he was not present at the time of the incident but reached at the place after the incident was over and that at that time, Bakabhai Kacharabhai Rajeshkumar Kacharabhai, Bhikhabhai Mangabhai, Jadiben Kacharabhai and complainant beat him; that Bakabhai Kacharabhai gave axe blow on his head and Bhikhabhai gave stick blow; that he had a stick and therefore, with a view to save himself he used it and thereafter went to hospital for treatment at about 10-00 O'clock as he could not get vehicle. It is further explained that he used stick in self-defence and he has not caused the injuries intentionally; that no persons had sustained injuries in the incident wherein Bharatbhai sustained injuries and false case is filed.

7. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge found the appellant guilty for the offence punishable under Section 323 of the I.P. Code and sentenced him to undergo the sentence as mentioned hereinabove. The other accused were acquitted for the offence charged against them. Being aggrieved and dissatisfied by the impugned judgment, the appellant has preferred the present appeal.

8. It would be relevant to record that Sessions Case No. 138 of 1998 was tried with Sessions Case No. 64 of 1999 and the learned Judge convicted Bakabhai @ Dashrathbhai Kacharabhai for the offence punishable u/s 302 of the I.P. Code and Rajeshkumar Kacharabhai for the offence punishable u/s Section 324 of the I.P. Code but acquitted accused Kacharabhai Mangabhai, Jadiben Kacharabhai and Bhikhabhai Mangabhai. The convicts in the said case preferred Criminal Appeal No. 877 of 1999 before this Court whereas complainant Shakarabhai preferred Criminal Revision Application No. 457 of 1999 and State preferred Criminal Application No.905 of 1999 against the acquittal of accused Jadiben and Bhikhabhai. Both these appeals have been dismissed by the High Court by order dated 26-

10-1999. We have heard Criminal Appeal No.877 of 1999 filed by the convicts in Sessions Case No.138 of 1998 with these proceedings.

9. The original complainant in this offence filed Criminal Revision Application No. 529 of 1999 and State has preferred Criminal Appeal No.863 of 1999 against acquittal of the accused – Shakarabhai Madhabhai and Kamuben Shakarabhai. In view of the fact that both these proceedings arise out of the judgment and order dated 31-7-1999 passed by the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 64 of 1999, Criminal Appeal No.863 of 1999 and Criminal Revision Application No.529 of 1999 are disposed of by this common judgment.

10. Considering the evidence of the case, it becomes clear that two offences were registered in respect of the incident that occurred around 5-00 p.m. on 23.3.1998.

11. We have heard the learned advocate Mr. Y.N. Ravani for the appellant of Criminal Appeal No.863 of 1999 and Mr. M.S. Desai learned advocate for the original complainant and Mr. K.P. Rawal, learned A.G.P. for the State at length and in great detail. We have also perused the judgment of the trial court as well as the

record and proceedings of the case.

12. Learned advocate Mr. Ravani for the appellant of Criminal Appeal No. 863 of 1999 submitted that two incidents occurred in quick succession and the appellant was not present at the time of first incident but when he returned home, complainant and his family members attacked him, therefore with a view to save himself he used the stick and the injuries caused to the injured were in exercise of right of self-defence. He submitted that the learned trial Judge committed error in convicting the appellant for the offence punishable u/s 323 of the I.P. Code. Hence, the appeal is required to be allowed and the appellant is required to be acquitted of the offence charged against him.

13. While opposing the appeal, the learned A.P.P. Mr. Rawal submitted that the appellant voluntarily caused hurt and the medical evidence establishes the injury, therefore, the learned trial Judge was justified in convicting the appellant for the offence punishable u/s 323 of the I.P. Code and no interference is warranted in the impugned judgment.

14. Mr. M.S. Desai, learned advocate for the applicant of Criminal Revision Application

No.529 of 1999 submitted that the evidence on record clearly implicates the involvement of all the accused and the prosecution proved beyond reasonable doubt that the respondents were involved in the incident, and therefore, the learned trial Judge committed error in acquitting the respondents but was justified in convicting one of the accused. Therefore, Revision Application is required to be allowed and the appeal filed by the appellant is required to be dismissed.

15. In view of the fact that appellant Ashokbhai has admitted his presence at the time of the incident wherein complainant Kacharabhai had sustained injury, no elaborate discussion with regard to his involvement in the incident is required. However, according to the appellant the injury was caused to Kacharabhai in the second incident which took after the first incident i.e. attack by the complainant and his family members on accused Shakarabhai and others was over and the injuries were caused in private defence. Therefore, before examining that whether there were two incidents, the nature of injuries to Kacharabhai is required to be examined.

16. According to the prosecution, the appellant

caused injury to complainant on his right hand by iron rod. Complainant P.W. 3 Kacharabhai Mangabhai at Exh. 19 in his deposition deposed that at about 5-00 p.m. when he was on his 'panshop' near the rear door of his house Bharatbhai and accused Shakarabhai with wooden log and appellant Ashokbhai with iron rod came there and started giving abuses by saying that why he has put 'panshop' there and that place does not belong to his father. Therefore, the witness requested them not to give abuses. Thereby Bharatbhai got enraged and gave stick blow on his head and appellant Ashokbhai gave iron rod blow on his left hand. In the cross-examination, the witness denied that the appellant was not present at the time of the incident.

17. The prosecution also examined P.W. 1 Dr. Amrutlal Lallubhai Patel at Exh. 11 who examined injured Kacharabhai Maganbhai Prajapati. According to the witness, Kacharabhai had C.L.Ws. on occipital parietal region and left forearm and pain and tenderness on right forearm and the injuries were simple and were possible by hard and blunt object. The witness also opined that injury on head and forearm were possible by iron rod. The prosecution also produced the injury certificate at Exh. 12. It indicates that

the injuries were C.L.W.S. and tenderness. Therefore, the injuries caused to Kacharabhai were simple in nature.

18. Now the next question required to be examined is whether injured Kacharabhai sustained injuries in the second incident and appellant was not present when the first incident took place?

19. It appears from the record that appellant had also sustained injuries. The prosecution examined P.W.2 Dr. Dilipkumar Kantilal Jogia at Exh.16. According to the witness, appellant came to the hospital for treatment without police 'Yadi' and gave history of injuries that he had sustained the injury at 5-00 p.m. caused by stones and hoe inflicted by Bakabhai i.e. Son of the complainant. The medical certificate Exh.17 indicates that Ashokbhai was admitted in the hospital at 8-45 p.m. without police "Yadi". It is not in dispute that the appellant did not file any compliant for the injuries caused to him. It is also not in dispute that on the previous day of the incident there was quarrel between the parties and as a consequence thereof the incident ensued. Therefore, as there was enmity between the two families, the appellant would have filed compliant against his attackers but strangely no complaint is filed. P.W. 2

Dilip has also deposed that injured Ashok gave him history of incident occurred at 5-00 p.m. In view of this, the evidence adduced in Sessions Case No.138 of 1998 is required to be looked into. We are conscious of the settled principle that in deciding cross-case the court can rely on the evidence recorded in a particular case and the evidence recorded in the cross-case cannot be looked into. In the present case, the appellant raised defence of cross-case but looking to the facts of the case and evidence recorded, in our view, this was not a cross-case. Therefore, it is permissible to consider the evidence adduced in other case. In Sessions Case NO.138 of 1998 the prosecution had examined one Dahyabhai Kacharabhai as eye witness to the incident who had also deposed that appellant Ashok was present when the incident occurred wherein Bharatbhai sustained injuries. On analysis of the evidence it becomes clear that appellant was injured in the same incident wherein Bharatbhai was injured. Therefore, it is difficult to accept that two independent incidents occurred at 5-00 p.m. as pleaded by the appellant. In our view, the theory of two incidents is made out only with a view to get support in the case filed against the complainant and raise defence in the present case. Therefore, in our view, only one incident

took place around 5-00 p.m. on 23-8-1998 and persons from both the sides sustained injuries in the incident.

20. According to the prosecution, the incident took place at the entrance of Prajapativas in village Balva where the complainant had kept his 'panshop' in order to prove this, the prosecution examined P.W. 4 Jadiben Kacharabhai Prajapati at Exh. 20. She deposed that when her husband Shakarabhai was sitting on 'panshop', the appellant and other accused came there with weapons and attacked them. She also deposed that the appellant had iron rod and had inflicted blow on her left hand.

21. P.W. 3 Kacharabhai deposed that when he was at 'panshop' which is near the rear door of his house, the appellant and other accused came there and assaulted him. P.W. 4 Jadiben also gave identical version about the place of incident. P.W. 5 Natvarbhai also deposed that on hearing shouts at 'panshop' of Kacharabhai he went there but the witness did not give location of 'panshop'.

22. The prosecution produced panchanama of scene of offence at Exh. 31. It may be recorded that panchanama of scene of offence was drawn

and the map was also prepared in the compliant filed by accused Shakarabhai which was registered as I – CR No.76 of 1998. The same panchanama was treated as panchanama in the present offence.

23. The panchanama of scene of offence indicates that the blood stained spots were found at the place of the incident. Panch P.W. 8 Thaguji Nathuji Exh 24 did not support the prosecution case. However, it transpires that the incident The appellant did not raise any dispute about the place of incident. occurred on the road going to Prajapati Vas. The appellant did not raise any dispute about the place of incident.

24. In view of above, it becomes clear that only one incident occurred around 5-00 p.m. wherein complainant Kacharabhai was injured and appellant was present at the time of incident. Therefore, the question now requires to be examined is whether the appellant exercised his right of private defence ?

25. It appears from the evidence that on account of the quarrel between the complainant, the appellant and other accused there was free fight between them. The evidence also indicates that deceased Bharatbhai had also sustained injuries

in the said incident and had died. The panchanama of scene of offence indicates that blood stained spots were found. Therefore, there was fight between two groups and with a view to save himself the appellant exercised his right of private defence by using stick. Under Section 96 of the I.P. Code, nothing is offence which is done in exercise of right of private defence. The evidence indicates that P.W. 3 Kacharabhai had sustained injury. The injury certificate Exh. 12 indicates that the injury sustained by him was simple. Looking to the nature of injury the appellant did not exceed in exercise of his private defence as least injury was caused to the victim. In our view, the appellant committed no offence in using stick for his private defence. Therefore, the learned trial Judge committed error in convicting the appellant for the offence punishable u/s 323 of the I.P. Code. Hence, the impugned judgment is required to be set aside.

26. As regards Criminal Revision Application filed against acquittal of accused Shakarabhai Madhabhai Prajapati and Kamuben Shakarabhai Prajapati, we find that the learned trial Judge has correctly appreciated the evidence. There is no evidence with regard to role allegedly played by accused Shakarabhai and Kamuben. There

is no evidence to indicate that the accused gave kick blows to Jadiben or that Naranbhai who tried to intervene was also injured. Therefore, the learned trial Judge was justified in recording acquittal of the respondents of Criminal Revision application No.529 of 1999, and therefore, no interference is warranted in the impugned judgment.

27. For the reasons recorded in the judgment, Criminal Appeal No. 863 of 1999 succeeds and is allowed, whereas Criminal Revision Application No. 529 of 1999 fails and is dismissed.

28. The conviction and sentence of appellant Ashokbhai Shakarabhai Prajapati of Criminal Appeal No. 863 of 1999 recorded vide judgment and order dated 31-7-1999 passed by the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 64 of 1999 for the offence punishable u/s 323 of the I.P. Code is set aside. He is on bail and hence his bail bond stands cancelled.

29. The muddamal be disposed of as directed by the trial court.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

/JVSatwara/